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14.

MINORITY REPORT

OF THE

Committee on Judicial Proceedings

IN REFERENCE TO THE

PARK TAX

OF THE

CITY PASSENGER RAILWAYS

OF BALTIMORE.

To the General Assembly of Maryland,

MARCH 19TH, 1874.

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1874.

MINORITY REPORT.

PRESENTED BY F. P. STEVENS, SENATOR, SECOND LEGISLATIVE DISTRICT, BALTIMORE CITY.

Upon the Senate Bill entitled "An Act for the relief of the Baltimore City Passenger Railway Company.

The Bill reported favorably by a majority of the Committee on Judicial Proceedings is objected to by me for the reasons herein set forth.

It provides for relieving the Passenger Railway Companies of the city of Baltimore of a tax called the "Park Tax," to the extent of one-half the amount now required to be paid to the said city. In order to understand the nature of this "Park Tax," it will be necessary to examine into its history.

The first proposition looking to the construction of a Passenger Railway in the city of Baltimore was by Chas. A. Talbott, Esq., who, on the 17th of January, 1859, as a member of the City Council, introduced a resolution reciting that by the Act of the General Assembly of 1831, chapter 252, full power was given to the city of Baltimore for the construction of tracks along its streets, and by said resolution directed the Committee on Highways to inquire into the expediency of constructing a City Passenger Railway.

In pursuance of that resolution, Wm. H. Travers, Robert Cathcart and others submitted a proposition for constructing a Railway, the fare to be *five cents*, and offering to pay a bonus of $20,000, and other taxes, for the franchise to be granted.

A proposition was also made by Chauncy Brooks, Zenus Barnum and others, to run the cars for *three cents* fare, and offering a bonus of $10,000. This was called the "Brooks Bill."

And a proposition from W. G. Thomas, John H. B. Latrobe and others, offering to pay a license fee of "fifty-six dollars, and the sum of $26,000, out of the earned profits, over and

above six per cent., to be set apart and invested for the use of the Public Schools, or in such way as the Mayor and City Council may direct." The fare to be *five cents.*

The City Council passed the bill known as the "Travers Bill," being the one first mentioned herein, with a provision in the 5th section thereof that the fare should "not exceed *four cents*, and that the sum of twenty dollars should be paid annually upon each car running regularly on said Railway, as license money thereof, to the City Register."

This ordinance, upon being presented to the Mayor, (Hon. Thomas Swann,) was vetoed, and in his veto message stated, that he would approve the ordinance if again submitted to him with certain modifications, which he set forth, among them, that the fare should be *five cents*—one-fifth of the gross receipts of said Company to be paid to the city, for the purpose of establishing a Public Park, and of the construction of a grand avenue two hundred and fifty feet in width, around the suburbs of the city. (And to the Hon. Thomas Swann belongs the credit of having, by his great foresight and wisdom, bestowed upon the people of Baltimore a boon of priceless value.)

That the *city* should have the right to reduce the fare, if deemed advisable, "after securing the objects above contemplated."

(Journal of the First Branch of the City Council, March 22, 1859, page 558.)

The suggestions of the Mayor were adopted, and the "Travers" ordinance finally passed by the following vote: 1st Branch—Yeas: Messrs. President, (John T. Ford,) John W. Randolph, Silas Beacham, Charles A. Talbott, Wm. E. Beale, Wm. H. Jenkins, George A. Cunningham, Samuel T. Houston, John Hamilton, Jas. Clark, Jas. H. Wood, John W. Glanville, Wm. Addison, Thos. H. Mules—14. Nays: Caleb B. Hynes, G. V. Henderson, Alford Mace, L. P. D. Newman, Geo. W. Bain, Wm. L. Montague—6. 2d Branch —Yeas: Messrs. Wm. A. VanNostrand, Wm. H. Cathcart, Jas. H. Cook, David Taylor, John Musselman, Amos McComas, Thos. Sewell, Jr.—7. Nays: Messrs. President, (Wm. McPhail,) Wm. Colton, Evan T. Ellicott—3; and approved March 28, 1859.

In pursuance of the conditions of the foregoing ordinance, on the fourth of June, 1860, by resolution No. 227 of the City Council, it was proposed as follows: "Whereas, as one-fifth of the revenue from the Passenger Railway Company is to be devoted to the purchase of a Park or Parks for the city of Baltimore; and whereas a considerable portion of the funds are already in the hands of the Register, and more accruing

every day; and whereas, it is fitting that some action looking to a proper selection of the Park or Parks, and the purchase of the same, should be taken by the present Council; therefore,

"*Resolved*, That the Mayor be and he is hereby authorized and empowered to appoint four discreet persons, who, with the Mayor, shall constitute a commission to select and purchase, in the name of the Mayor and City Council, a site or sites, the number of acres, &c, for the proposed Park or Parks, and that said commission shall serve without pay or emolument."

Then followed the ordinance in regard to the purchase of said Parks, ordinance No. 60, approved July 21st, 1860, as follows:

1. "Whenever the commissioners appointed under a resolution of the Mayor and City Council of Baltimore, entitled 'Resolution appointing a commission in relation to the proposed Public Parks,' shall certify to the Register under their respective hands, that they have purchased the site or sites for a a Park or Parks, describing the same in their said certificate, and stating the price agreed upon to be paid therefor, and the terms of sale, it shall be the duty of the said Register to issue and deliver to the said commission certificates of stock of the Mayor and City Council of Baltimore in the usual form, redeemable at the end of thirty years from the date thereof, and designated on the face of the certificate as "Public Park Stock" for the amount of said purchase money, and in accordance with the terms of sale, which certificates of stock shall be delivered to the vender or venders of such site or sites by the said commissioners, upon the conveyance to the Mayor and City Council of Baltimore of the property so purchased, and after the Counselor of the city shall have certified to the sufficiency of the title or titles thereof, and should the said commission not be able to complete the purchase of said site or sites at one time, so as to be obliged to make several certificates to the Register—the same proceedings as those just mentioned shall be had in each and every case."

2. "That the revenue derived and to be derived by the Mayor and City Council of Baltimore from the City Passenger Railway, is hereby *pledged* and *set apart* for the payment of the interest on the certificates of stock to be issued under this ordinance."

3. "That one-fifth of the revenue aforesaid remaining, after the payment of the interest aforesaid, shall be invested by the Register in the stock of the city of Baltimore as a sinking fund for the redemption of the stock created by this ordinance."

4. "That the four-fifths of said remaining revenue shall be paid by the Register, on the order of the said commission, as the said revenue shall be received, for the improvement and maintenance of the park or parks aforesaid."

There are other provisions in the ordinances, but not germain to the subject now under consideration.

Mayor Swann, and the other Commissioners, who were Messrs. John H. B. Latrobe, Wm. E. Hooper, Robert Leslie, and Columbus O'Donnell, Esqs., opened negotiations with the owner of Druid Hill Park, (Lloyd N. Rogers, Esq.) "A stipulation was made for one-fourth of the purchase money *in cash*, the ordinance having provided that the whole amount of the consideration should be paid in the stock of the city. So soon as this condition became known, a number of our public-spirited citizens, unwilling that any impediment should stand in the way of the prompt execution of the contract, generously tendered their checks to the Commissioners in furtherance of this object, and became the purchasers of one-fourth of the stock paid him by the city. The names of the gentlemen sharing with the Commissioners in this advance are, Chauncy Brooks, John S. Gittings, Thos. Winans, George S. Brown, John M. Orem, and Benj. De Ford." (Mayor Swann's address upon the occasion of the inauguration of Druid Hill Park, October 19th, 1860.)

The Public Park stock issued as above mentioned, set forth upon its face, "City of Baltimore," "Six per Cent." "Public Park Stock." "Sinking Fund provided for the redemption of, in 1890." "This is to certify that the Mayor and City Council of Baltimore are indebted to ..... in the sum of ..... dollars, redeemable at the pleasure of the *Mayor and City Council of Baltimore*, at any time on or after the 1st day of September, 1890, on the presentation and surrender of this certificate, with interest at six per centum per annum, payable quarterly on the first days of December, March, June and September, in each year. THIS CERTIFICATE is issued by virtue of ORDINANCE No. 60, of the Mayor and City Council of Baltimore, approved July 21, 1860, entitled 'An ordinance to provide for a Public Park, or Parks,' and is transferrable only at the Mayor's office, in person or by attorney, and on the delivery of this certificate."

"In witness whereof," &c.

The General Assembly, by the Act of 1861, chapter 41, by section 4, ratified and confirmed the foregoing resolution and ordinance, "the same as if the said Mayor and City Council had been, previously to the passage of the said ordinance, authorized and empowered by the Act of the General Assembly of Maryland to enact an ordinance in the precise terms of the

ordinance above referred to, and to provide for carrying the same into effect."

The railway company, in 1862, applied to the Legislature for a charter, the original parties to the ordinance granting them the right to construct the railway, viz: Wm. H. Travers and others, having assigned all their rights, powers and privileges to Henry Tyson, Jonathan Brock, and others, they were, by the Act of 1862, chapter 71, granted a charter which, while pending, was known as the "Brock Bill." The charter making the company subject to all the provisions of the ordinance, and that they should "pay over to the Register of the city of Baltimore one-fifth portion of the whole passenger receipts of this corporation, at or before the stated periods named in the aforesaid recited ordinance of the city of Baltimore; in default of which payments on or before the days appointed therefor, this corporation shall be liable to the penalty of one hundred dollars for each day of the continuance of such default."

The General Assembly, by the Act of 1862, chapter 29, entitled, "An Act to ratify the purchase, and to provide for the organization and government of Druid Hill Park, and Patterson Park, belonging to the city of Baltimore, by incorporating certain additional sections in Article 4 of the Code of Public Local Laws, under the title of Parks," re-enacted the entire Act of 1861, chapter 41, and put in also other provisions in regard to parks, and arranged the sections as required by the Constitution of the State. Therein *also* confirming the resolution and ordinance of the year 1860, "and all acts done, or which may hereafter be done," under said resolution and ordinances.

The cars of the Railway Company now were run at a fare of five cents. The Act of 1864, chapter 170, sec. 1, raised the fare of the Railway Company to six cents, and no charge for transfers; and section 2 provided that this Act should only "continue in force for two years from the date of its passage. The Act of 1865, chapter 100, sec. 1, continued the previous Act, but gave the company the right to charge four cents for transfers, and the charge of six cents fare, without any limit of the duration thereof, as in the previous Act. Both of these Acts contained the provision that one-fifth of the gross receipts should be paid to the city as heretofore, and also contained prayers "*for relief.*"

The company, in 1864, also appealed "*for relief,*" to the City Council of Baltimore, and they generously passed a resolution (No. 17) exempting all the stock of the company, the buildings and property of every description from city taxation, and suspended the collection of license fees. After this

was done, there were other new Railway Companies started and running in the city, and finding the City Council so considerate, *they* also prayed "*for relief*" last year, (1873) and, as one of the members of the Council informed me, "after a fearful struggle," all the companies were exempted from city taxation, and the license fee on them all brought down to five dollars per car. The capital stock alone of these companies exceeding two millions of dollars; the entire value of their property I do not know, but it is very large.

The assets of the Baltimore City Passenger Railway were reported by the Special Committee of the stockholders, appointed to investigate the affairs of the company, at a meeting held November 22, 1873, as being in the aggregate about one million three hundred thousand dollars.

There are now in the city besides this company three others, viz: "The Citizens," "The Baltimore, Peabody Heights and Waverly," and "The Baltimore and Hall Springs" lines, and now the Railway Company charges three cents for transfers. This, then, is a sketch of the Legislative history of the company.

We find that they are again before the General Assembly praying "*for relief*," as will appear by the Journal of the Senate of 1874, page 155; that in response to their memorial, a Select Committee, to whom the matter was referred, reported on the 13th day of February (Senate Journal of 1874, page 270,) in favor of reducing the "Park Tax" imposed on them of one-fifth of their gross receipts, down to one-half a cent on each adult passenger.

The memorial and report was afterward referred to the Committee on Judicial Proceedings, for a report on the constitutionality of modifying or reducing the park tax aforesaid by the Legislature.

After the report of the Select Committee, the Mayor of the city of Baltimore, impressed with the importance of the measure proposed, and desiring to be informed of the legality of such a measure as was favorably reported upon by the committee, requested the opinion of the City Counsellor, which was as follows:

BALTIMORE, February, 16th, 1874.

Hon. Joshua Vansant, Mayor of Baltimore City.

DEAR SIR: I have examined the ordinance of July 21st, 1860, (No. 60) and also the ordinance of March 28th, 1859, (No. 44) referred to in your note of the 14th inst., and am of opinion that the Legislature cannot constitutionally reduce the one-fifth of the gross receipts of the City Passenger Rail-

ways, secured to the city by the ordinance of 1859, to one-half of a cent per passenger.

These ordinances have both been substantially adopted by State Legislation, and have thus acquired the force of laws. By the 14th section of the ordinance of 1859, the company is required to pay to the City Register quarterly "one-fifth of the gross receipts from the passenger travel upon said road, &c." By the 1st section of the ordinance of 1860, provision is made for the issuing of certificates of stock designated on their face as "Public Park Stock;" by the 2d section the revenue derived and to be derived by the Mayor and City Council from the City Passenger Railways is thereby pledged and set apart for the payment of the interest on the certificates of stock to be issued under the ordinance; and by the 3d section, one-fifth of the revenue remaining after payment of the interest is to be invested as a sinking fund for the redemption of the stock.

We have here first a revenue from the City Passenger Railways provided by law, and then an express pledge of that revenue for payment of interest, &c., made and held out to those who would take the stock. All this entered into the contract with the holders of this stock, and is their security for the payment of the interest and the redemption of the principal. It seems too clear for argument that any law which diminishes this security impairs the obligation of the contract under the constitution of the United States. If the security may be diminished, its diminution may be carried to a point which is substantially its destruction. It will not be questioned that this revenue could not constitutionally be taken from the holders of the stock by appropriating it to other objects than those specified in the ordinance, and it is not perceived that there is any difference in point of law between such a course and the taking it away from the holders of the stock, by giving it up and releasing the railways from its payment. To take it from the city by State Legislation is virtually to take his security from the stockholder.

As to the power of the Legislature in reference to contracts of a municipal corporation, it is sufficient to refer to the general principle as stated in Dillon on Municipal Corporations, section 41, in these words: "It is an interesting inquiry which has not yet arisen for judgment, whether the Legislature of the State has the right in virtue of its control over municipal corporations to annul or interfere with contracts between two municipalities. If a municipal corporation, however, becomes indebted, the *rights* of *creditors* cannot, it is clear, be impaired by any subsequent Legislative enactment."

Very respectfully, your obedient servant,

[Signed.] I. NEVITT STEELE.

After this, February 24th, the Company obtained the opinion of the eminent Counselor, Hon. S. Teackle Wallis, to the effect, that it was lawful to modify or reduce the Park Tax upon the Company; and subsequently he appeared before the Committee on Judicial Proceedings of the Senate, and ably argued the legal questions at length, stating that "the opinion of the City Counselor, in no point of view," commanded his "professional concurrence;" stating that the proposition the company, now made, was to reduce the tax to one-tenth of the gross receipts instead of as it now is, viz: one-fifth.

After this, the distinguished Counselor of the city of Baltimore (Mr. Steele) appeared before the committee and presented his views of the constitutional aspect of the case.

Whilst I do not presume to claim for my opinion, upon questions of law, that estimate so justly accorded to the learned Counsel for the Company, yet I feel warranted in offering for the consideration of the Senate the authorities I have examined, which lead me to think that the opinion of the Counselor for the city of Baltimore is correct, and that any legislation tending to repeal, or reduce the tax now imposed by law upon the Railways of the city of Baltimore, would be unconstitutional and void, and will venture to give the reasons why I think such legislation, as is asked for, would impair the obligation of contracts, which, under the Constitution of the United States, is forbidden.

The latest decision upon the questions involved in this case is that reported in 16th Wallace, 314, U. S. Supreme Court Reports, Walker vs. Whitehead. This was a case in error from the Supreme Court of the State of Georgia, decided December, 1872. The head note is as follows:

"The laws which exist at the time of the making a contract, and in the place where it is made and to be performed, enter into and make part of it. This embraces those laws alike which affect its validity, construction, discharge and enforcement. The remedy or means of enforcing a contract is a part of that "obligation" of a contract which the constitution protects against being impaired by any law passed by a State.

Held, accordingly, when, on the 1st of January, 1870, suit was brought on a promissory note given in March, 1864, payable March, 1865, that a law passed in October, 1870, which enacted (by one section) that in all suits pending on any contract made before June 1st, 1865, it should not be lawful for the plaintiff to have a verdict unless he made it appear that all taxes chargeable by law on the same had "been *duly paid for each year* since the making of the same;" and enacted

(by another section) that it should be a condition precedent to such recovery that "the said debt has been *regularly* given in for taxes and the taxes paid ;" and (by other sections) made other retrospective enactments, impaired the obligation of a contract, and was accordingly unconstitutional."

Mr. Justice Swayne (who rendered the opinion in 4th Wallace, 535, Von Hoffman vs. the city of Quincy,) says, in delivering the opinion of the Court, "The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment.

"The obligation of a contract 'is the law which binds the parties to perform their agreement;' any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution.

"The States may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement which existed when it was made. The guarantee of the Constitution gives it protection to that extent."

Another very important case is that of Von Hoffman vs. the city of Quincy, 4th Wallace, 535, decided in the Supreme Court of the United States, December, 1866. The head note states :

1. Where a statute has authorized a municipal corporation to issue bonds, and to exercise the power of local taxation in order to pay them, and persons have bought and paid value for the bonds issued, accordingly the power of taxation thus given is a contract within the meaning of the constitution, and cannot be withdrawn until the contract is satisfied. The State and the corporation in such a case are equally bound.

2. A subsequently passed statute which repeals or restricts the power of taxation so previously given, is in so far as it affects bonds bought and held under the circumstances mentioned, a nullity.

3. It is the duty of the corporation to impose and collect the taxes in all respects as if the second statute had not been passed.

4. If it does not perform this duty a *mandamus* will lie to compel it.

In this case the relator filed his petition in the United States Court, for the Southern District of Illinois, alleging "that he was the owner of certain coupons on interest notes of the city of Quincy, that were past due and unpaid. When issued and negotiated they were attached to certain bonds, made and delivered by that city in payment for the stock of the Northern Cross Railroad Company, and of the Quincy and Toledo Railroad Company, subscribed for by the city, under certain acts of the Legislature, and by the provisions of these acts the city was authorized to collect a special annual tax upon the property therein, sufficient to pay the annual interest upon any bonds thereafter issued by the city for railroad purposes, pursuant to law.

"That the tax when collected should be *set aside*, and held separate from the other portions of the city revenue, as a fund *specially pledged* for the payment of the annual interest upon the bonds aforesaid.

"It was to be applied to this purpose, from time to time, as the interest should become due, *and to no other purpose whatsoever.*"

The city failed to pay the coupons. The relator sued the city, and recovered judgment for $22,206.69 and costs—the execution was returned unsatisfied, and the city refused to levy the requisite tax.

He therefore prayed that a writ of mandamus might issue, commanding the city to pay over to him the amount of his claim out of any money not otherwise appropriated, and for want of such funds to levy a special tax therefor as required by the acts of the Legislature referred to.

The city filed its answer that there was no money in the treasury wherewith to satisfy the judgment, and, as a reason why a peremptory writ of *mandamus* should not issue, referred to an act of the Legislature of Illinois of the "14th of February, 1863," which imposed certain taxes therein set forth, and provided that all laws inconsistent therewith were thereby repealed, and that the full amount of taxes therein authorized had been levied, and that the amount, when collected, would not be sufficient to pay the current expenses of the city.

The relator demurred to the answer, and judgment was given against him.

Justice Swayne, who delivered the opinion of the Court, held that the effect of the act referred to, of February 14th,

1863, repealed the previous acts of the Legislature, which as herein stated, provided for the levy of a special tax, and that it should be '*set aside*' as a fund '*specially pledged*' for the payment of these coupons, and that the repeal of the previous acts was a violation of the constitutional provisions againt impairing the obligation of contracts; he reviewed the cases previously decided upon this question in the United States and State Courts. Hon. Caleb Cushing, being the attorney for the city of Quincy, having brought to the attention of the Court all the important decisions bearing upon the case, the Court said, in relation to the act of February 14, 1863, 'the amount permitted to be collected by that act will be insufficient, and it is not certain that anything will be applicable to that object, to the extent of the deficiency, the obligation of the contract will be impaired, and if there be nothing applicable it may be regarded as annulled."

"It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied."

"The State and the corporation in such cases are equally bound; the power given becomes a trust, which the doner cannot annul, and which the donee is bound to execute, and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other. The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued are still in force for all the purposes of this case."

"The act of 1863, is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects, as if that act had not been passed."

"A different result would leave nothing of the contract but an abstract right, of no practical value, and render the protection of the Constitution a shadow and a delusion."

"The Circuit Court erred in overruling the application for a *mandamus*. The judgment of the Court is *reversed*, and the cause will be remanded, with instructions to proceed in conformity with this opinion."

Another case, that of the Brooklyn Park Commissioners vs. Armstrong, 45th, New York, (Court of Appeals,) 234.

This was a case where the Park Commissioners of Brooklyn, in pursuance of authority from the Legislature, Act of 1861, chapter 340, purchased lands for "Prospect Park," and were authorized to *pledge* the *land* to secure the payment of the

bonds issued by them to the parties from whom they purchased the grounds for the Park. Subsequently, the Park Commissioners, desiring to sell certain lots east of Flatbush avenue, applied to the Legislature for authority to sell them, which was granted, Act of 1870, chapter 373, which provided, "by deeds with or without warranty, which deeds should vest in the grantees an absolute title in fee simple; the proceeds of sale to be devoted to the sinking fund for the redemption of park bonds."

A purchaser of one of these lots, upon enquiring into the title thereof, refused to take the lot of ground, "alleging that the act is unconstitutional, and that neither the city nor the commissioners can give a valid title to the fee free from all encumbrances." The Court below gave judgment against the purchaser.

Held, "that the terms of the act and the issue of the bonds constituted a contract between the bond holder of the one part, and the city and State on the other, specifically pledging the land taken for the payment of the bonds, and that a subsequent act of the Legislature, authorizing a sale of any portion of the park, free of all liens existing by virtue of the original act, was in violation of the Federal Constitution, as impairing the obligation of contracts, and that even though the avails of the sales should be held as a sinking fund for the redemption of the bonds when due, did not avoid the objection."

Judge Folger, in delivering the opinion of the Court, said: "It is true that the danger to the purchaser, to all seeming, is very slight and very remote; that the premises for which he has contracted will ever be called upon to contribute to the payment of these bonds."

The probabilities are he will not.

"But yet there is a possibility. The debt is an encumbrance upon this land, and does affect that for which the appellant bargained. This is a legal certainty."

There are many other cases that could be cited upon this question, but these are leading cases upon the subject, and the decisions settle the law, that no variation or impairment of a contract, in the slightest degree, can by law be permitted.

The question to be determined is, is there a contract existing between the State, the city, and the holders of the park stock, that a *specific fund* shall be set aside for the payment of the interest upon, and the final redemption of the said stock, known as the "Park Stock," which was issued by the Park Commissioners to the vendors of the lands now constituting the parks of the city of Baltimore, and which stock is designated upon the face of the certificate as "Public Park

Stock," as required by Ordinance No. 60, of 1860. The amount of Park Stock, now outstanding, is over $700,000.

The revenue derived from the tax of one-fifth of the gross receipts of the railway companies, is the only present source from which is derived the means of paying the interest upon this stock, and for its final redemption, "at the end of thirty years from the date thereof."

Now, whilst the city may be, perhaps, still liable, when you *repeal this entire tax*, (as by a *later opinion*, given by Mr. Wallis to Governor Bowie, now the President of the Railway Company, he states that *undoubtedly* it is lawful so to do—which opinion has been kindly shown me by the President,) yet, when this tax is repealed, what remedy has the stockholder for his interest and principal? What fund will it be paid from? There is not now in existence, any law or ordinance, except those herein referred to, which provides for the payment of either interest or principal of the debt due on the parks.

Admitting that the city is bound to pay for the parks, it will become necessary to obtain from the proper authorities, power to *levy a tax*, to meet this liability. There is certainly a "*degree of impairment*," existing in the *interim*, between the repeal of this tax, and the enactment of a law, to provide for the payment of the interest, and principal, of the stock. And all the authorities agree, that you cannot impair the obligation of a contract, in "*the slightest degree*."

There seems to be no doubt of the right of the Legislature to alter or repeal the charter of a municipal corporation, or to change the rate of taxes, or exempt property entirely from taxes, subject to the provisions of the State Constitution; but the *Aegis* of the Constitution of the United States is over and above the State Constitution, and prohibits the State from doing *any act*, which will impair the obligation of a subsisting contract.

The case of the Baltimore and Ohio Railroad, referred to by the learned counsel for the Railway Company, the constitutionality of which, he says, has never been disputed, I have been unable to find that any action was ever brought in the Courts to test its constitutionality, because the interest on the bonds has always been promptly met.

He also states that the city has the power "*at any time*" to reduce the fare charged by the company, (opinion page 7.) I find by reference to the ordinance No. 44, section 47, (City Code, page 588,) that its language is, "and the Mayor and City Council shall have the power, *on the completion of said improvements*, (*i. e.* the city Boundary avenue and the Park, or Parks,) to reduce the rate of fare on passenger travel, &c."

He also refers to the right of the city to purchase the railway, &c., "within two years after the expiration of fifteen years from the passage of this ordinance," section 46 of ordinance No. 44, (on page 7, printed opinion,) and says "those who took the stock issued under the Park ordinance did so with knowledge that the revenue pledged to them was subject to extinguishment by either of the modes indicated. If the security which it offered entered at all into their calculations, it was a security necessarily precarious, both as to continuance and amount."

In regard to the purchase of the railway by the city, I suppose there was good reason for making this reservation, but certainly, if it were done, it would have to be accomplished in such a manner as in *no way* to impair the obligation of contracts between the city and the holders of "Park Stock."

He also states, (opinion page 8,) "whether it had the right to issue the Park Stock, can only be determined by ascertaining to what extent it had previously exhausted its limited power to contract such indebtedness. At all events, it was considered prudent, if not necessary, to have the Park ordinance ratified by the Legislature, and this was done as has been said by the act of 1862, chapter 28." The *first* act passed, ratifying and confirming the resolution of June 4th, 1860, and the ordinance approved July 21st, 1860, was the act of the General Assembly of 1861, chapter 41. (And *not* the Act of 1862, chapter 71.) Section 4, of that Act, ratifies, and says, "to all intents and purposes, as if the said Mayor and City Council had been, previously to the passage of the said ordinance, authorized, and empowered, to act by the General Assembly of Maryland, to enact the ordinance in the precise terms of the ordinance above referred to, and provide for carrying the same into effect."

And there is no provision in *this act*, that the General Assembly reserves the right to "repeal, alter, or amend."

The learned Counsel for the Company, (opinion, page 8,) in referring to the reservation in the charter of the Company granted by the Act of 1862, chapter 71, says: "not only were the conditions legalized, which I have before referred to, and which made the tax entirely precarious, but an express provision (sec. 12) reserved to the Legislature in the amplest way the power at all times to repeal, alter or amend the charter, although the same was in fact unnecessary."

Whatever action had been taken by the Park Commissioners in their contracts or purchases between July 21, 1860, the date of the Park Ordinance, and June 12, 1861, the date of the Act of Assembly, this act made all they had done *preoi. vusly* valid and legal, and also has enabled them legally to do

what they have been doing ever since its passage, within the terms of the original ordinance. The ordinance of the city was legalized as soon as it could be, that is, at the first assembling of the Legislature after its adoption. The constitution of 1851, section 47, of the 4th article, provided that all special acts of *incorporation* should be subject to alteration or repeal, but I do not think this Act of 1861, chapter 41, is an act of incorporation; the title is "an act to amend the fourth article of the code of Public Local Laws, by adding thereto the following sections relating to the purchase and government of Druid Hill and Patterson Parks, belonging to the city of Baltimore."

The Eminent Counsel for the Railway Company *was a member* of the House of Delegates, which passed this very act, and upon the passage of it I find his name recorded as voting in the affirmative. (House Journal, 1861.)

The eminent Counsel for the Company says (page 8 and 9 of his opinion):

"The Legislature, therefore, could not have given to the Company a charter which would not have been open to absolute legislative control, and it was consequently a condition, both express and necessarily implied, of *the very charter which gives to the city and the holders of Park Stock their present legal relation to the revenue in question*, that every part of that charter, *including the part which provides for the tax*, should be subject to *modification* or *repeal* in the *discretion* of the General Assembly."

"*The holders of the park stock have no rights*, under the charter, *which are not necessarily subordinate to this condition. Add to this the facts, by notice of which the takers of the stock were likewise bound*, (Mumma vs. Potomac Co. 8 Peters, 287,) *that the revenue may likewise fail, at any moment*, through the forfeiture or surrender of the charter, by the railway itself; and that such forfeiture may at any time follow its inability to perform its corporate duties. Here then we have, not simply and nakedly "a revenue from the city passenger railways and a pledge of that revenue for payment of interest, &c., made and held out to those who would take the stock," as is assumed and stated by the learned Counsellor of the city, *but a revenue which was made extinguishable and defeasible by the very ordinance which created it, and is liable to reduction or extinguishment at any time, by the terms of the charter under which it is now payable.*

Thus, therefore, the holders of the Park Stock took with notice not only of the character and limited contracting powers of the municipal corporation with which they were dealing, but of the *actual conditions* and *express limitations* which

might at *any moment* render the *pledge* to them *unavailing*, by the destruction of the revenue pledged. The law gave them notice, that the Mayor and City Council could not part with their control over the regulation of the revenue in question, except by clear and express stipulation ; and that they could not bind themselves (if at all) to keep it at its existing standard, except by positive enactment to that effect. They had further notice from the ordinance and the charter, *that this revenue was not meant, from its inception, to be fixed and unchangeable*, but, on the contrary, was made subject to contingencies, in which it might be *modified or put an end to*, at the pleasure of the city or State. Under such circumstances I cannot escape from the conclusion, that to alter or diminish it, to-day, is but to *exercise a clear constitutional right of the Legislature*, which not only has never been parted with, but, on the contrary, *was carefully reserved.*

I think I may add, with propriety, that this whole constitutional question is not, in my judgment, a practical one in the present case. The security of the railway revenues *amounts practically to nothing*, so far as the ultimate redemption of the park stock is concerned. The revenue applicable to that purpose is to be invested as a sinking fund in the ordinary stock of the City of Baltimore—that is to say, in the city's own promises to pay—and it is not presumed that the security of the holders of park stock is much improved by that operation, inasmuch as their own stock itself is already a promise of the same sort, resting on the same responsibility and of equal validity and value. But for a desire to avoid multiplying points, I should have called attention moreover to the fact that the word "pledge" is not used in the Park ordinance, except as to the interest, and that the provision for the principal has no such word of contract or dedication.

The whole amount of the park stock interest will hardly exceed $40,000 per annum, and it would be idle to suggest any doubt of the absolute certainty of its payment out of the ordinary revenues of the city, or to assert that the pledge of the railway revenues add appreciably to its security or to the value of the stock in the market. Like all city stock, it derives its value altogether from the credit and well-known solvency of the corporation, and except for accidental and independent reasons, one issue of city stock sells quite as well as another, without the slightest reference to the revenues pledged to secure the payment of any. The application of particular revenues to particular stock, is, therefore, really nothing but a financial provision made by the city for its own convenience in meeting its obligations, *and I very seriously question whether it would not be held by the courts that I have*

conceded to much, for the sake of the present argument, in admitting that the legislation here in question *involved any contract whatever with the takers of the stock.*

But be this as it may, the Legislature, as I have said, *has absolute control* over the whole subject for the present purpose.

It has exerted its control on two several occasions, (Acts of 1864 and 1865,) by increasing the fare, and allowing compensation for transfer tickets, whereby the revenue in question has been augmented. Against these modifications neither the city nor the holders of the park stock have made any protest, for they have been to the profit of both. But they both took the risks, in my opinion, of decrease as well as increase in the fund, *and the State may fairly control it in one way as well as in the other.*

To repeal or modify the tax is in effect only to direct, that the city shall raise the revenue required, by one sufficient tax rather than another. It is in no sense to diminish the obligation of the city to pay the holders of the stock, or to put in peril the security of their investment, about the ultimate safety of which no man can entertain a reasonable doubt."

I agree with the able opinion, that the act, entitled "An Act to incorporate the Baltimore City Passenger Railway Company," chapter 71 of 1862, may be amended or repealed as duly reserved in the charter, (section 12,) provided always, however, that there are no constitutional objections. But I cannot refrain from expressing great surprise at the opinion of the learned counselor, upon the propositions stated in the opinion which I have herein lastly quoted.

I hold that the Park Tax would remain intact, if *every word* that refers to it, were erased, from the "Act to incorporate the Baltimore City Passenger Railway Company."

That this *charter*, or act of *incorporation*, DOES NOT "give to the city and the holders of park stock their present legal relation to the revenue in question," but that the Acts of 1861, chapter 41, and 1862, chapter 29, are *the acts*, that define, and determine, the *status* of the park tax and the park stock.

I ask the attention of the Senate to these Acts of Assembly, for they may be misled, like some of the members of the bar of the State have been, by inadvertence, in not examining the laws critically and with diligence.

I also desire the Senate, in considering this application "*for relief*," to remember that less than six months ago the company declared a dividend to their stockholdrs, and paid them *thirty thousand dollars*. When at this very period of time,

[N. B.—The italicised portions of the opinion of Hon. S. Teackle Wallis, are so placed by the author of this report.]

they owed the city of Baltimore $66,283.17, (Dec. 31, 1873,) and instead of paying this or replenishing the "worn out rails," cars, &c., &c., they granted "*relief*" to the very parties who are to-day asking "*for relief*" from the General Assembly. And, also, that Senators will observe that *they* make no *concession whatever* to the people of Baltimore; the fare by this bill they ask you to pass is fixed at *six cents*, the same as it has been, and also an extra charge as heretofore for transfers from one route to another of three cents.

They are seeking to relieve *themselves* of taxation, and to burden the people of Baltimore with what they contracted to pay in consideration of a grant of the most valuable franchise ever granted by any city in the United States, (*i. e.* the right to lay tracks in all its principal streets.)

By the passage of this bill, the stock of the company will be largely enhanced in value, and instead of its paying "the average dividend of four and a half per centum per annum since its organization," as set forth in their memorial, it will be increased to double that amount.

And further, that this same company has, at *every session* of the General Assembly since it was chartered, been praying "*for relief*," either by bill otherwise.

I will briefly refer to some of the cases cited as authorities by the Counsel for the company.

The case of Gilman vs. the city of Sheboygan, 2d Black, U. S. S. C. R., 510, so fully relied upon by the learned Counsel, decided that the State Legislature could change or modify taxation, or exempt portions of property from all taxation, and that a *real estate owner* therein has no right to complain on the score of bad faith to the *bondholders*, if the *bondholders are silent;* and in this case there was no allegation that the tax was insufficient. This was not a case such as we have under consideration. There is no doubt of the right of the State to change taxation, or modify the charter of a municipal corporation, *provided* that such Legislation does not impair subsisting rights, or impair thereby the obligation of contracts entered into between the municipal corporations and third persons. And the case cited of The City of Richmond, vs. the Richmond, and Danville, Railroad Company, 21st Grattan, 604, only decides that the State, notwithstanding it had in the charter of the city of Richmond, given it power to levy taxes upon all the property in the city of Richmond, yet, the "city charter is not a contract between the State and the city, securing to the city the absolute power of taxation beyond the control or modification of the Legislature."

In this case it appears that the Legislature exempted the property of the Railroad Company from all taxes whatever.

The Court says: "the manner of apportionment, the form of assessment and collection, the species of property which shall be the subject of taxation or exemption, are matters purely within the legislative discretion, except where the constitution ordains the rule." And in another case cited as authority in reference to the matter before the Senate, the case of Goszler vs. the corporation of Georgetown, 6 Wheaton, 593, Chief Justice Marshall decided that "the power of graduating the streets is not in the nature of a compact, and may be altered by the corporation." This case does not affect the question at issue.

My report upon this bill is that, in my humble judgment, its provisions are in conflict with the Constitution of the United States, as they impair the obligation of contracts, and the bill would therefore be a nullity if passed.

Did I believe the General Assembly had the legal right to do so, I would gladly vote for and advocate a bill to abolish the park tax, and put the car-fare down to five cents, thereby relieving a large class of the people of Baltimore from the payment of a tax from which many of them have not the opportunity to derive any benefit. And as one of the taxpayers I would cheerfully pay my share toward the payment for the parks and for their maintenance.

Respectfully submitted,

FRANCIS PUTNAM STEVENS,
One of the Committee on Judicial Proceedings.

SENATE, ANNAPOLIS,
March 19, 1874.